LIBRARY
PREME COURT, U. S.

No. 944

Office-Supreme Court, U.S.
FILED
JAN 18 1968
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1967.

CITY OF EAST ST. LOUIS,

Respondent,

vs.

UNION ELECTRIC COMPANY,
a Corporation,

Petitioner.

BRIEF OF RESPONDENT CITY OF EAST ST. LOUIS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

AVERN B. SCOLNIK
29 South La Salle Street
Chicago, Illinois
Counsel of Record for Respondent

ROBERT F. GODFREY
601 Murphy Building
East St. Louis, Illinois

THOMAS A. MATTHEWS
DONALD J. KREGER
29 South La Salle Street
Chicago, Illinois
Counsel for Respondent

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

PAGE

Opinions Below 1

Questions Presented 2

Statement of the Case 3

Argument 5

Conclusion 9

Table of Cases.

City of East St. Louis v. Union Electric Company, 37 Ill. 2d 537, 229.N.E. 2d 522 3

Duluth and Iron Range Railroad v. County of St. Louis, 179 U.S. 302, 21 S. Ct. 124, 45 L. Ed. 201 8

St. Louis v. United Railways Co., 210 U.S. 266, 28 S. Ct. 630, 52 L. Ed. 1054 7

Stearne v. Minnesota ex rel Mar, 179 U.S. 223, 21 S. Ct. 73, 45 L. Ed. 162 8

Winter v. Barrett, 352 Ill. 441, 186 N.E. 113 ..... 6, 7

Statutes and Ordinances Cited.

Ill. Rev. Stat, 1933, Ch. 120, §4.41 ..... 2, 6, 7

Ill. Rev. Stat, 1965, Ch. 111⅔, Sec. 36(a) 2

Ill. Rev. Stat, 1965, Ch. 24, par. 8-11-2 5

East St. Louis Ill., Ordinance 3193 ..... 5, 6

East St. Louis, Ill., Ordinance 3698 ..... 2, 3, 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

No. 944

CITY OF EAST ST. LOUIS,

Respondent,

vs.

UNION ELECTRIC COMPANY,
a Corporation,

Petitioner.

BRIEF OF RESPONDENT CITY OF EAST ST. LOUIS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of Circuit Judge Richard T. Carter is unreported and is printed at pages A-10 to A-12 of the appendix to the Petition.

The opinion of the Supreme Court of Illinois is reported in 37 Ill. 2d 537, 229 N.E. 2d 522 and is printed in the appendix to the Petition at pages A-1 to A-9.

QUESTIONS PRESENTED

The first question presented by the Petitioner omits any reference to the fact that the Petitioner, Union

Electric Company, collected the tax under the ordinance enacted subsequently to the franchise ordinance from its consumers and retained three per cent (3%) of those collections to cover its cost of collecting and remitting the tax to the City in accordance with Illinois Revised Statutes, 1965, Chapter 111⅔, Section 36 (a), (Public Utilities Act). The question should be: Is the subsequent tax in effect a taxing of the consumer rather than a taxing of the Company so that such tax would not impair the obligation of the franchise contract. This question was decided adversely to the Petitioner by the Supreme Court of Illinois.

In its second question, the Petitioner improperly raised for the first time a due process question. The Petitioner further fails to set out that it admitted in its answer to the original complaint filed in the Circuit Court of St. Clair County that it collected the taxes paid pursuant to the ordinance enacted subsequently to the franchise ordinance from its consumers, retaining three per cent (3%) of such collections as its cost: What property, therefore, is the Company being deprived of without due process? The Petitioner has sustained no damages or loss as a result of the later tax.

Petitioner, in its third question, again raises a question which is not timely—equal protection. In that question, Petitioner fails to recognize the difference between the tax provided for in "An Act in relation to a tax upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption", Illinois Revised Statutes, 1933, Chapter 120, Section 4.41, and the tax involved in this case. The tax imposed upon persons engaged in the business of selling tangible personal property does not provide for the business to

retain a percentage of the tax for cost of collection. The question properly stated should be: Is the Company in effect an agent for the City in collecting the tax from the consumer? The Supreme Court of Illinois decided in the affirmative.

The fourth question posed in the Petition assumes that the Supreme Court of Illinois refused to accept the language of the franchise contract when in fact that Court interpreted that contract not to include in its set-off provision a tax upon the consumer.

STATEMENT

The statement of the case contained in the petition is substantially correct except that it contains no reference to the fact that the Company pursuant to statutory authorization separately adds the amount of the tax imposed by the 1960 ordinance to its bill to the consumer, and deducts three per cent (3%) before remitting it to the city although the Company stated in its verified answer:

> "It admits, that pursuant to law and to all requisite regulatory authority first duly obtained, it has made a charge, within all permissive statutory and regulatory limitations, to customers, in the City of East St. Louis, for the tax imposed upon and paid by it to the City of East St. Louis under the terms and provisions of Ordinance No. 3698."

The Petitioner also fails to point out that the Supreme Court of Illinois elaborated upon its decision that the Utility Tax Ordinance did not impair the obligation of the franchise contract by stating that:

> "Under the tax ordinance the consumers paid the taxes and the Company was but a conduit for the

transmittal of moneys to the City", and that "the Company so far as the franchise contract was concerned remains in the same position it occupied prior to the enactment of the Utility Tax Ordinance." (Petition p A-8)

The Supreme Court of Illinois further stated that, "Where the status quo of the contractual relationship is undisturbed it cannot be plausibly said that there has been any impairment of contract." (Petition p A-8)

The decision of the Supreme Court of Illinois is not contrary to admitted and stipulated facts. The tax was in effect imposed upon the consumer rather than upon the Company.

ARGUMENT

The decision of the Supreme Court of Illinois is a correct application, to the facts and circumstances of the instant case, of the accepted principles of law. There is no dispute that the franchise ordinance No. 3193 is a contract binding upon the City and Company, and there can be no dispute that the Company is permitted to and does pass on the Utility Tax to the consumer and further retains a fee for collecting the tax.

The Utility Tax imposed by the 1960 ordinance is not the type of charge referred to in subparagraph (b) of paragraph B in Section 6 or Ordinance No. 3193. (Petition pp.) A-16-19). The gross income of the Company is not affected by this charge which is actually a tax on the consumer and not a tax on the Company.

Obviously, subparagraph (b) of paragraph B of Section 6 of the 1948 franchise ordinance contemplated "fees, licenses, charges, taxes or other exactions of whatsoever kind or character" paid by the Company. The percentage of gross receipts payable to the City under the franchise ordinance was to be reduced by the amount of those charges paid by the Company—if any.

The tax imposed under Chapter 24, paragraph 8-11-2, Illinois Revised Statutes, 1965 (Petition pp. A-22-26) is not a charge against the Company. It is a charge against the consumer. The Company is authorized to add this amount to its bill and to reimburse itself for the cost of collecting it.

If the Company's contention were sustained, it would make a sheer profit, in excess of the amount contemplated

by the 1948 franchise. That franchise contemplated any tax *paid by the Company* could be deducted from the franchise fee. Clearly, a charge not paid by the Company but collected by the Company from the consumer was not the type included in subparagraph (b), Paragraph B of Section 6 of Ordinance No. 3193. (Petition p. A-13).

Contrary to the statement of the petitioner that the Supreme Court of Illinois rewrote the franchise ordinance, (Petition p. 15) that Court did not alter the terms of the contract, but rather, correctly decided that this was not a tax contemplated by the franchise ordinance because it was not a tax upon the Company.

The Petitioner seeks to compare the utility tax with the Illinois Retailers Occupation Tax of 1933 and cites *Winter* v. *Barrett*, 352 Ill. 441, 186 N.E. 113, wherein the Supreme Court of Illinois ruled that the Retailers Occupation Tax (Petition pp. 17-18) was a tax upon the occupation rather than upon the consumer. On pages 455 and 456 of that opinion the Court states:

> "By Section 2 the tax (Retailers Occupation Tax) is imposed on such persons, and the measure of the tax is fixed at three per cent of the gross cash receipts from the sales of tangible personal property by such persons. Section 3 provides for returns to be made by such persons giving information from which the amount of the tax may be determined. From these provisions it appears that the tax is imposed upon persons engaged in the business mentioned. They are the persons who are required to pay the tax. They are not made the agents of the State or of the Department of Finance to collect the tax from purchasers and pay it over to the department. . . . If prior to April 1, 1933, the selling price of an article was one dollar, and thereafter the seller, taking into consideration the tax in fixing the price

> of the article, charges one dollar and three cents for the same article, he cannot report that the cash received from the sale of the article was one dollar and that the three cents was collected as tax, but in reporting his receipts, he must report the total amount received—that is, one dollar and three cents —and pay a tax three per cent of that amount."

In the instant case, the Company collects the utility tax separately and retains three per cent of that amount for costs incurred. Such was not the case in the Illinois Retailers Occupation Tax of 1933. *Winter* v. *Barrett* as cited above does not relate an effect of the Retailers Occupation Tax upon a particular franchise contract. The question in the case at hand is whether or not the utility tax should be set-off from the franchise tax. The Supreme Court of Illinois correctly held that it should not be.

In *St. Louis* v. *United Railways Co.,* 210 U.S. 266, 28 S. Ct. 630, 52 L.Ed. 1054, the United Railway Company claimed to be exempt from a certain tax by the terms of a contract with St. Louis. The Court in its opinion stated:

> "The principles involved in this case have been the subject of frequent consideration in the Court, and while it can be no longer doubted that a State or municipal corporation, acting under its authority, may deprive itself by contract of the power to exercise a right conferred by law to collect taxes or license fees, at the same time the principal has been established that such deprivation can only follow when the State or City has concluded itself by the use of clear and unequivocal terms. The existence of doubt in the interpretation of the alleged contract is fatal to the claim of exemption."

The Supreme Court of Illinois decided correctly in the present case that the utility tax is in effect a tax on the

consumers and consistent with the rules set forth in the St. Louis case determined that the terms of the franchise contract do not include the utility tax within the set-off provisions.

Obviously there are situations in which contract obligations have been impaired by subsequent legislation. Some of those situations have been cited by the petitioner. But no case cited by the petitioner involves a situation which is remotely similar to the facts and circumstances of the case at hand.

Duluth and Iron Range Railroad v. *County of St. Louis,* 179 U.S. 302, 21 S. Ct. 124, 45 L.Ed. 201, and *Stearne* v. *Minnesota ex rel Mar.,* 179 U.S. 223, 21 S. Ct. 73, 45 L.Ed. 162, cited on page 16 of the petition involve taxes upon a railroad which were not passed on to consumers and from which the Railroads were specifically exempted. The circumstances of those two cases cannot be compared with the circumstances giving rise to the instant case.

The constitutional guaranty of equal protection has not been raised in either the Supreme Court of Illinois or the Circuit Court of St. Clair County, and cannot now be raised in the petition for a Writ of Certiorari. (Petition p. 4) Even if the guaranty were raised at the proper time, there is nothing in this case which could be construed to deny the Company the Constitutional guaranty of equal protection. The Company is not within the same category as sellers of tangible personal property. It is subject to the same tax as are other public utilities. Further, the Company has never raised objection to the constitutionality of the utility tax.

The petitioner has for the first time raised a question as to whether the utility tax has unconstitutionally de-

prived the Company of its property without due process. (Petition p. 3). This issue cannot now be raised for the first time, and, even assuming the issue to be properly raised, it is without merit. The Supreme Court of Illinois did not reject any stipulated and admitted facts by determining that in fact the tax was paid by the consumer. No property of the Company has been taken so that it cannot be said that the Company has been deprived of its property without due process of law.

CONCLUSION

The petition for a Writ of Certiorari raises no questions which deserve consideration. The Supreme Court of Illinois correctly held that the utility tax was in effect a tax upon the consumer and not included within the set-off provision of the franchise ordinance. Respondent respectfully requests that this Court deny the Petitioner's request for the issuance of a Writ of Certiorari to the Supreme Court of Illinois.

Respectfully submitted,

AVERN B. SCOLNIK
Counsel of Record for Respondent
ROBERT F. GODFREY
THOMAS A. MATTHEWS
DONALD J. KREGER
Counsel for Respondent